# Guideline Sentencing Update

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## Sentencing Procedure

### Procedural Requirements

**Second Circuit holds that defendant was entitled to notice before sentencing hearing that district court planned to sentence her under harsher guideline than used in presentence report.** Defendant pled guilty to assisting the filing of a false federal income tax return. The PSR based her sentence on §2T1.4(a), with an ultimate guideline range of 0–6 months. At the sentencing hearing, however, the district court took a different view of the facts and used §2T1.9, leading to a sentence of ten months. The appellate court remanded, concluding that because the factors that determined which guideline section to use were "reasonably in dispute," *see* §6A1.3(a), defendant "was entitled to advance notice of the district court's ruling and the guideline upon which it was based."

*U.S. v. Zapatka*, No. 93-1805 (2d Cir. Dec. 29, 1994) (Van Graafeiland, J.). *Cf. U.S. v. Jackson*, 32 F.3d 1101, 1106–09 (7th Cir. 1994) (remanding sua sponte abuse of trust adjustment at sentencing hearing because defendant had no notice it was contemplated—"When the trial judge relies on a Guideline factor not mentioned in the PSR nor in the prosecutor's recommendation, contemporaneous notice at the sentencing hearing . . . fails to satisfy the dictates of Rule 32") (note: although concurring in the result, two judges on the panel did not join this part of the opinion).

See *Outline* at IX.E.

## Determining the Sentence

### Supervised Release

**Sixth Circuit holds that Anti-Drug Abuse Act of 1986 did not limit district court discretion to end supervised release after one year.** Defendant was sentenced under 21 U.S.C. §841(b)(1)(C), which requires a three-year term of supervised release. One year later, however, the district court terminated defendant's supervised release early pursuant to 18 U.S.C. §3583(e)(1). The government argued that the requirement for a three-year term in §841(b)(1)(C), enacted as part of the Anti-Drug Abuse Act of 1986, overrode §3583(e)(1) and therefore the district court had no authority to end defendant's supervised release early. The appellate court disagreed, concluding that when Congress enacted the ADAA "it only partially limited a court's discretionary authority to *impose* the sentence. Congress did not alter the court's separate authority to *terminate* a sentence of supervised release, under 18 U.S.C. §3583(e)(1), if the conduct of the person and the interest of justice warranted it. . . . [W]e hold that a district court has discretionary authority to terminate a term of supervised release after the completion of one year, pursuant to 18 U.S.C. §3583(e)(1), even if the defendant was sentenced to a mandatory term of supervised release under 21 U.S.C. §841(b)(1)(C) and 18 U.S.C. §3583(a)."

*U.S. v. Spinelle*, 41 F.3d 1056, 1059–61 (6th Cir. 1994).

See *Outline* generally at V.C.

### Fines

**Second Circuit holds that imposition of punitive fine is not required before cost of imprisonment fine may be imposed.** The district court did not impose a punitive fine under §5E1.2(a) and (c), but did impose a fine under §5E1.2(i) to cover the costs of defendant's imprisonment and post-release supervision. The appellate court affirmed, holding "that §5E1.2 does not require the district court to impose a fine under §5E1.2(c) before it can impose a fine measured by the cost of imprisonment under §5E1.2(i). We read the word 'additional' in subsection (i) as an expression of the Sentencing Commission's intention that a defendant's total fine, including the cost of imprisonment, may exceed the relevant fine range listed in subsection (c). . . . [T]he total fine is the significant figure. . . . If the defendant is not able to pay the entire fine amount that the court would otherwise impose pursuant to subsections (c) and (i), the district court may exercise its sound discretion in determining which of the two subsections (or which combination of them) to rely upon in pursuing the goals of sentencing. . . . [T]he fine money goes into the Crime Victims Fund regardless of which subsection the district court selects."

Three circuits now hold that a punitive fine is not required before a cost of imprisonment fine; four hold that it is.

*U.S. v. Sellers*, 42 F.3d 116, 119–20 (2d Cir. 1994).

See *Outline* at V.E.2.

# Adjustments

## Role in Offense

**Seventh Circuit holds that if number of persons is sole basis for finding activity was "otherwise extensive," that number must be more than five.** Defendant was convicted of extortion offenses and given a §3B1.1(a) enhancement for being the organizer of an "otherwise extensive" criminal activity. That finding was based solely on the fact that five persons were involved in the extortions—defendant, two other criminally responsible participants, and two "outsiders." The appellate court held that this was improper. "The involvement of five individuals, not all of whom are 'participants,' does not, without more, justify a finding that criminal activity was 'otherwise extensive.' . . . Although the meaning of 'otherwise extensive' is unclear, we must interpret that term in a manner that does no violence to the remainder of Section 3B1.1. Given the Section's five participant prong, it would be anomalous to conclude that the presence of five individuals—not all of whom are participants—warranted an increase. . . . If a district court intends to rely solely upon the involvement of a given number of individuals . . . , it must point to some combination of participants and outsiders equaling a number greater than five."

*U.S. v. Tai*, 41 F.3d 1170, 1174–75 (7th Cir. 1994).

See *Outline* at III.B.3.

**Seventh Circuit holds that status as distributor, without more, did not warrant §3B1.1(a) enhancement.** Defendant was convicted of conspiracy to distribute marijuana, possession of marijuana with intent to distribute, and money laundering. He purchased marijuana from coconspirators in Arizona and transported it back to Illinois for sale. He worked closely with several of the coconspirators, occasionally transported marijuana for one of them, and for a time subleased from one coconspirator a house used to process and store marijuana. The district court imposed a §3B1.1(a) enhancement, concluding that defendant was an organizer or leader of a criminal activity that involved five or more participants and was "otherwise extensive."

The appellate court remanded, concluding that defendant did not, in fact, organize or lead any other participants but operated within the conspiracy as an independent buyer and seller. The district court had reasoned that defendant "was at the top of a drug distribution network [and] exercised total decision making authority over his marijuana purchases." The appellate court held that "by itself, being a distributor, even a large distributor like Mustread, is not enough to support a §3B1.1 offense level increase. . . . If the record does not show that he [was an organizer or leader], if the defendant maintained no real guiding influence or authority over the purchasers, a §3B1.1 adjustment is inappropriate. . . . And the record does not show that Mustread had influence or authority over anybody to whom he distributed. Similarly, that Mustread 'exercised total decision making authority over his marijuana purchases' cannot, by itself, support the conclusion that Mustread played an aggravated role. One can make decisions for oneself without having authority or influence over others. The trial judge's reasoning does support the conclusion that Mustread committed the crimes of which he was convicted, but it is a significant extension from that to the conclusion that Mustread had an aggravated role relative to other participants." Defendant "exercised no decision making authority over other participants. He made decisions for himself, but the record does not show that he decided anybody else's course of action."

*U.S. v. Mustread*, 42 F.3d 1097, 1103–05 (7th Cir. 1994).

See *Outline* at III.B.4.

# Offense Conduct

## Loss

**Ninth Circuit holds that cost of committing crime is not subtracted from value of goods in calculating loss.** Defendant was convicted of theft of government property for harvesting and selling federal timber taken from U.S. Forest Service land. In calculating the loss under §2B1.1(b)(1), the district court used the value of the stolen timber. Defendant argued that "this amount erroneously includes the portion of the profit that was spent to cover logging expenses," which he would subtract from the gross value to measure the loss as defendant's "net gain." The appellate court disagreed and affirmed the district court. "We do not subtract the costs of pulling off the caper when we calculate the value of stolen property. Although being cut and carted away is surely a significant event from the perspective of a tree, it is not an economically significant event" for purposes of §2B1.1(b)(1).

*U.S. v. Campbell*, 42 F.3d 1199, 1205 (9th Cir. 1994).

See *Outline* generally at II.D.1.

## Drug Quantity—Relevant Conduct

**Eleventh Circuit holds that earlier drug sale was not part of relevant conduct.** Defendant was convicted of conspiracy to distribute dilaudid plus one

count of cocaine distribution that was directly related to the dilaudid conspiracy. The district court included as relevant conduct another cocaine distribution that was not part of the dilaudid conspiracy. Adopting the test for "similarity, regularity, and temporal proximity" used by other circuits (and now in §1B1.3, comment. (n.9(B)) (Nov. 1994)), the appellate court remanded. "Maxwell's counts of conviction involve a dilaudid distribution scheme. The extrinsic offense, on the other hand, involved a cocaine distribution scheme. Other than Maxwell, the dilaudid distribution scheme and the cocaine distribution scheme did not involve *any* of the same parties." Also, the two cocaine transactions occurred more than a year apart, so "these acts are temporally remote." The court concluded that "we cannot say that there are any 'distinctive similarities' between the dilaudid distribution scheme and the cocaine distribution scheme that 'signal that they are part of a single course of conduct.' Rather, the two offenses appear to be 'isolated, unrelated events that happen only to be similar in kind.' We do not think that two offenses constitute a single course of conduct simply because they both involve drug distribution."

*U.S. v. Maxwell,* 34 F.3d 1006, 1010–11 (11th Cir. 1994).

See *Outline* at I.A.2 and II.A.1.

# Departures

## Aggravating Circumstances

**Eighth Circuit affirms departure for dangerous nature of weapon involved in weapons offense.** Defendant pled guilty to the possession of a firearm in a school zone. The district court held that an upward departure was warranted under §5K2.6 "due to the dangerousness of the weapon involved"—a semi-automatic pistol—in close proximity to a school. Defendant argued on appeal that §5K2.6 may only be used to enhance a non-weapons charge. The appellate court held that "this reading of section 5K2.6 is too narrow. . . . Even where the applicable offense guideline and adjustments take into consideration a factor listed in the policy statements, departure from the applicable guideline range is warranted if the factor is present to a degree substantially in excess of that which is ordinarily involved in the offense. . . . The base offense guideline for 18 U.S.C. §922(q) penalizes simply the possession of a firearm within a school zone. *See* U.S.S.G. §2K2.5. It does not take into account whether the firearm was loaded, semi-automatic, easily accessible, or had an obliterated serial number. *See id.* All of these aggravating facts appear here. For an especially serious weapon, the district court has leeway to enhance the sentence accordingly, even in a weapons charge."

*U.S. v. Joshua,* 40 F.3d 948, 951–52 (8th Cir. 1994). See also *U.S. v. Thomas,* 914 F.2d 139, 143–44 (8th Cir. 1990) (without reference to §5K2.6, affirmed departure based on dangerous nature of fully loaded weapons for defendant convicted of possession of firearms by a convicted felon).

See *Outline* generally at VI.B.1.a.

## Criminal History

**Tenth Circuit reverses upward departure because dissimilar remote criminal conduct was not sufficiently serious.** Defendant had 14 prior convictions, 13 of which were not counted in his criminal history score because they were too remote under §4A1.2(e). The district court departed because of "the very extensive prior adult criminal conviction record of this defendant," increasing his criminal history category from I to III. The prior convictions were not similar to the current offense, but the court did not specify that the remote convictions comprised "serious dissimilar" criminal conduct so as to warrant departure pursuant to §4A1.2, comment. (n.8).

The appellate court remanded. In light of Note 8, "the upward departure can only be valid if the record showed 'serious dissimilar' conduct by the defendant." The record showed that the prior conduct should not be considered "serious." First, "defendant had never before been given a sentence of imprisonment exceeding one year and one month, a standard used in the Guidelines in setting the number of points assigned to prior convictions," *see* §4A1.1(a), and thus an indication of seriousness. Second, "little, if any, weight should have been given to the eight misdemeanor convictions which occurred more than 30 years prior to defendant's arrest in the instant case." A 1970 conviction for "assault on a female" may or may not have been serious, but "no evidence was produced regarding Wyne's underlying prior criminal conduct other than the fact of conviction, the offense or offenses included, and the sentence imposed. This is significant because . . . 'assault on a female' in . . . the state of conviction, can consist of mere verbal accosting." The government did not meet its burden of providing evidence that "it was 'serious dissimilar' conduct, within the meaning of the Guidelines." Lastly, the court concluded that defendant's four remote DUI convictions (from 1974 to 1982) could not, when "distinguishing offenses to be regarded as

'serious' from within the realm of all criminal behavior, . . . qualify as serious criminal conduct justifying the decision to depart."

*U.S. v. Wyne*, 41 F.3d 1405, 1408–09 (10th Cir. 1994).

See *Outline* at VI.A.1.b.

# General Application

## Double Jeopardy

**Seventh Circuit affirms consecutive sentences for RICO offense and pre-Guidelines predicate act offenses.** Defendants were convicted of a RICO violation, to which the Guidelines applied, and of several other offenses that served as the predicate acts supporting the RICO conviction and were sentenced under pre-Guidelines law. The district court made the Guidelines and pre-Guidelines sentences consecutive. Defendants appealed, arguing that separate consecutive sentences for the predicate acts—which were used to increase their Guidelines sentences for the RICO offense—subjected them to multiple punishment for the same offense in violation of the Double Jeopardy Clause.

The appellate court affirmed. "Perhaps the simple answer to this problem is, given that RICO and the predicate acts are not the same offense, Defendants clearly were never punished twice for the same crime: Defendants were punished once for racketeering and once (but separately) for extortion, gambling, and interstate travel. It just so happens the Sentencing Guidelines consider the predicate racketeering acts (i.e. extortion, gambling, and interstate travel) relevant to computing the appropriate sentence for racketeering. *See* U.S.S.G. §2E1.1(a). Though the commission of these acts increased the racketeering sentence, the Defendants were punished for racketeering—the predicate acts were merely conduct relevant to the RICO sentence. . . . Provided Defendants could be convicted for both RICO and predicate act offenses (which they could) and provided the sentencing court could consider the predicate acts in assessing the RICO sentence insofar as they were conduct relevant to the RICO act (which it could) no double jeopardy problem portends."

*U.S. v. Morgano*, 39 F.3d 1358, 1367 (7th Cir. 1994).

See *Outline* at I.A.4.

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**Certiorari granted:** *U.S. v. Wittie*, 25 F.3d 250 (5th Cir. 1994), *cert. granted*, *Witte v. U.S.*, 115 S. Ct. 715 (Jan. 6, 1995) (note: spelling of name corrected in Supreme Court). Question presented: Does government prosecution and punishment for offense violate Double Jeopardy Clause if it already was included in relevant conduct for sentencing under federal sentencing guidelines in different and final prosecution? *See* summary of *Wittie* in 6 *GSU* #16 and *Outline* at I.A.4.

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